

## **APPLICABLE LAWS AND REGULATIONS**

### **Overview**

The three major environmental statutes that guide the restoration of the injured resources and lost services for the Cape Mohican oil spill are OPA, NEPA, and CEQA. These statutes set forth a specific process of environmental impact analysis and public review. In addition, the Trustees must comply with several additional federal, state and local applicable statutes, regulations and policies. Relevant, and potentially relevant, statutes, regulations and policies are discussed below.

In addition to compliance with these statutes and regulations, the Trustees should consider relevant environmental or economic programs or plans that are ongoing or planned in or near the affected environment. The Trustees should ensure that proposed restoration projects neither impede nor duplicate such programs or plans. By coordinating restoration projects identified in this document with other relevant restoration programs and plans, the Trustees can enhance the overall effort to restore and improve the environment and resources affected by the oil spill.

Several of the restoration actions proposed in this RP/EA involve activities conducted in wetlands and waters of the United States. Therefore, these activities are subject to review and approval by the appropriate regulatory agencies.

### **Federal Statutes**

#### **Oil Pollution Act of 1990 (OPA), 33 USC 2701, et seq.; 15 CFR Part 990**

OPA establishes a liability regime for oil spills that injure or are likely to injure natural resources and/or the services that those resources provide to the ecosystem or humans. Federal and State agencies and Indian tribes act as Trustees on behalf of the public to assess the injuries, scale restoration to compensate for those injuries and implement restoration. Section 1006(e)(1) of OPA [33 USC 2706 (e)(1)] requires the President, acting through the Under Secretary of Commerce for Oceans and Atmosphere (NOAA), to promulgate regulations for the assessment of natural resource damages resulting from a discharge or substantial threat of a discharge of oil. Assessments are intended to provide the basis for restoring, replacing, rehabilitating, and acquiring the equivalent of injured natural resources and services.

This rule provides a framework for conducting sound natural resource damage assessments that achieve restoration. The process emphasizes both public involvement and participation by the Responsible Party(ies). The Trustees have followed the regulations in this assessment.

#### **National Environmental Policy Act (NEPA), as amended, 42 U.S.C. 4321, et seq., 40 C.F.R. Parts 1500-1508**

The National Environmental Policy Act requires an assessment of any federal action that may impact the environment. NEPA applies to restoration actions undertaken by federal trustees, except where a categorical exclusion or other exception to NEPA applies. Congress enacted NEPA in 1969 to establish a national policy for the protection of the environment. NEPA established the Council on Environmental Quality (CEQ) to advise the President and to carry out certain other responsibilities relating to implementation of NEPA by federal agencies. Pursuant

to Presidential Executive Order, federal agencies are obligated to comply with the NEPA regulations adopted by the CEQ. These regulations outline the responsibilities of federal agencies under NEPA and provide specific procedures for preparing environmental documentation to comply with NEPA. NEPA requires that an Environmental Assessment (EA) be prepared in order to determine whether the proposed restoration action would have a significant effect on the quality of the human environment.

Generally, when it is uncertain whether an action would have a significant effect, federal agencies would begin the NEPA planning process by preparing an EA. The EA may undergo a public review and comment period. Federal agencies may then review the comments and make a determination. Depending on whether an impact is considered significant, an environmental impact statement (EIS) or a Finding of No Significant Impact (FONSI) would be issued.

The Trustees have integrated this RP/EA with the NEPA and CEQA processes to comply, in part, with those requirements. This integrated process allows the Trustees to meet the public involvement requirements of OPA, NEPA and CEQA concurrently. The RP/EA is intended to accomplish partial NEPA and CEQA compliance by: (1) summarizing the current environmental setting, (2) describing the purpose and need for restoration action, (3) identifying alternative actions, (4) assessing participation in the decision process. Project-specific NEPA and CEQA documents may be needed for some of the proposed restoration projects. Other projects may fall within an existing EIS or EIR.

### **Clean Water Act (CWA) (Federal Water Pollution Control Act), 33 U.S.C. Section 1251, et seq.**

The objective of the Clean Water Act (*Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq.*) is to restore and maintain the chemical, physical, and biological integrity of the nation's water. The CWA is the principal statute governing pollution control and water quality of the nation's waterways. To this end, Section 404 of the CWA requires a permit from the U.S. Army Corps of Engineers (COE) for the discharge of dredge or fill material into waters of the United States, including most wetlands. Section 401 of the CWA requires states to certify that any federally permitted or licensed activity that might result in a discharge to waters of the United States, including issuance of a Section 404 permit, would not violate applicable water quality standards established by the states. In California, Section 401 water quality certification program is administered by the Regional Water Quality Control Boards. Together, the statutory authority of NEPA and CWA regulate most types of work conducted in wetlands.

### **National Park System Resource Protection Act, 16 USC 19jj**

Public Law 101-337, the Park System Resource Protection Act (*16 USC 19jj*), requires the Secretary of the Interior to assess and monitor injuries to NPS resources. The Act specifically allows the Secretary of the Interior to recover response costs and damages from the Responsible Party causing the destruction, loss of, or injury to park system resources. This Act provides that any monies recovered by the NPS may be used to reimburse the costs of response and damage assessment and to restore, replace or acquire the equivalent of the injured resources.

## **Coastal Zone Management Act (CZMA), 16 U.S.C. 1451, et seq., 15 CFR Part 923**

The goal of the federal CZMA is to preserve, develop and, where possible, restore and enhance the nation's coastal resources. The federal government provides grants to states with federally-approved coastal management programs. The State of California has a federally-approved program. Section 1456 of the CZMA requires that any federal action inside or outside of the coastal zone that affects any land or water use or natural resources of the coastal zone shall be consistent, to the maximum extent practicable, with the enforceable policies of approved state management programs. It states that no federal license or permit may be granted without giving the State the opportunity to concur that the project is consistent with the state's coastal policies. The regulations outline the consistency procedures.

The Trustees do not believe that any of the proposed projects would adversely affect the state's coastal zone. However, to comply with the CZMA, the Trustees intend to seek the concurrence of the State of California that their preferred projects are consistent to the maximum extent practicable with the enforceable policies of the state coastal program.

## **Endangered Species Act (ESA), 16 U.S.C. 1531, et seq., 50 C.F.R. Parts 17, 222, 224**

The federal ESA directs all federal agencies to conserve endangered and threatened species and their habitats and encourages such agencies to utilize their authorities to further these purposes. Under the Act, the National Marine Fisheries Service (NMFS) and the USFWS publish lists of endangered and threatened species. Section 7 of the Act requires that federal agencies consult with these two agencies to minimize the effects of federal actions on endangered and threatened species. Prior to implementation of these projects, the Trustees would conduct Section 7 consultations in conjunction with Essential Fish Habitat (EFH) consultation.

As noted in the RP/EA, several federal and state-listed species frequent the areas impacted by the oil spill. They are also in areas where the Trustees are considering restoration projects. Some listed species, such as the California brown pelican and western snowy plover, would benefit from the proposed restoration projects. Should it be determined that any of the proposed projects would adversely affect a threatened or endangered species, the Trustees would either redesign the project or substitute another project.

## **National Marine Sanctuaries Act (16 U.S.C. 1431 et. seq.)**

Under the National Marine Sanctuaries Act the Secretary of Commerce is authorized to designate discrete areas of the marine environment as National Marine Sanctuaries to protect distinctive natural and cultural resources whose protection and beneficial use requires comprehensive planning and management. The purpose of the Act is to identify, designate, and manage areas of the marine environment of special national significance due to their conservation, recreational, ecological, historical, research, educational, or aesthetic qualities. The goals of the Act are to provide enhanced resource protection through conservation and management of the Sanctuaries that complements existing regulatory authorities; to support, promote, and coordinate scientific research on, and monitoring of, the site-specific marine resources of the Sanctuaries; to enhance public awareness, understanding, appreciation, and wise use of the marine environment; and to facilitate, to the extent compatible with the primary objective of resource protection, multiple uses of the National Marine Sanctuaries. The Act provides authority for comprehensive and coordinated conservation.

## **Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 et seq.**

The federal Magnuson-Stevens Fishery Conservation and Management Act as amended and reauthorized by the Sustainable Fisheries Act (Public Statute 104-297) establishes a program to promote the protection of essential fish habitat (EFH) in the review of projects conducted under federal permits, licenses, or other authorities that affect or have the potential to affect such habitat. After EFH has been described and identified in fishery management plans by the regional fishery management councils, federal agencies are obligated to consult with the Secretary of Commerce with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any EFH.

## **Fish and Wildlife Coordination Act (FWCA), 16 U.S.C. 661, et seq.**

The federal FWCA requires that federal agencies consult with the USFWS, NMFS, and state wildlife agencies for activities that affect, control or modify waters of any stream or bodies of water, in order to minimize the adverse impacts of such actions on fish and wildlife resources and habitat. This consultation is generally incorporated into the process of complying with Section 404 of the Clean Water Act, NEPA or other federal permit, license or review requirements.

## **Rivers and Harbors Act, 33 U.S.C. 401, et seq.**

The federal Rivers and Harbors Act regulates development and use of the nation's navigable waterways. Section 10 of the Act prohibits unauthorized obstruction or alteration of navigable waters and vests the Corps with authority to regulate discharges of fill and other materials into such waters. Restoration actions that require Section 404 Clean Water Act permits are likely also to require permits under Section 10 of the Rivers and Harbors Act. However, a single permit usually serves for both. Therefore, the Trustees can ensure compliance with the Rivers and Harbors Act through the same mechanism.

## **Executive Order (EO) 12898—Environmental Justice**

On February 11, 1994, President Clinton issued EO 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. This EO requires each federal agency to identify and address as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority and low-income populations. The Environmental Protection Agency and the CEQ have emphasized the importance of incorporating environmental justice review in the analyses conducted by federal agencies under NEPA of developing mitigation measures that avoid disproportionate environmental effects on minority and low-income populations. The Trustees have concluded that no low income or ethnic minority communities would be adversely affected by the proposed restoration activities.

## **Executive Order (EO) 11988—Construction in Flood Plains**

This 1977 Executive Order directs federal agencies to avoid to the extent possible the long-and short-term adverse impacts associated with the occupancy and modification of flood plains and to avoid direct or indirect support of development in flood plains wherever there is a practicable alternative. Each agency is responsible for evaluating the potential effects of any action it may take in a flood plain. Before taking an action, the federal agency should determine whether the proposed action would occur in a flood plain. For major federal action significantly affecting the

quality of the human environment, the evaluation would be included in the agency's NEPA compliance document(s). The agency should consider alternatives to avoid adverse effects and incompatible development in flood plains. If the only practicable alternative requires sitting in a flood plain, the agency should: (1) design or modify the action to minimize potential harm, and (2) prepare and circulate a notice containing an explanation of why the action is proposed to be located in the flood plain.

## **State Statutes**

### **California Environmental Quality Act (CEQA) (Pub. Res. Code sections 21000-21177.1)**

The California Environmental Quality Act, commonly referred to as CEQA, was adopted in 1970 and applies to most public agency decisions to carry out, authorize or approve projects that may have adverse environmental impacts. CEQA requires that agencies inform themselves about the environmental effects of their proposed actions, consider all relevant information, provide the public an opportunity to comment on the environmental issues, and avoid or reduce potential environmental harm whenever feasible.

The CEQA process begins with a preliminary review as to whether CEQA applies to the project in question. Generally, a project is subject to CEQA if it involves discretionary action by an agency that may cause a significant effect on the environment. Once the agency determines that the "project" is subject to CEQA, the lead agency should then determine whether the action is exempt under either a statutory or categorical exemption, *14 Cal. Code Regs. Section 15061*.

If the lead agency determines that the project is not exempt then an Initial Study should be prepared to determine whether the project may have a potentially significant effect on the environment, *14 Cal. Code Regs. Section 15063*. To meet the requirements of this section, the lead agency may use an environmental assessment prepared pursuant to NEPA. Based on the Initial Study, the lead agency determines the type of CEQA documentation that will be prepared. The test for determining whether an Environmental Impact Report (EIR) or Negative Declaration should be prepared is whether a fair argument can be made based on substantial evidence that the project may have a significant adverse effect on the environment, *Pub. Res. Code Section 21068, 14 Cal. Code Regs. Section 15063*.

The State lead agency (CDFG) considers a number of these proposed projects to be categorically exempt pursuant to: (1) *14 Cal. Code of Regs. Section 15304*, "Minor alterations to land, water, or vegetation" (2) *14 Cal. Code of Regs. Section 15307*, "Actions by regulatory agencies for protection of natural resources," and (3) *14 Cal. Code Regs. Section 15308*, "Actions by regulatory agencies for the protection of the environment." Nonetheless, the State lead agency, in coordination with the Federal Trustees, decided to proceed with further CEQA documentation. The Trustees have integrated this RP/EA with the NEPA and CEQA processes to comply, in part, with those requirements.

This RP/EA, is intended to address the initial study requirements under CEQA by: (1) summarizing the current environmental setting; (2) describing the purpose and need for restoration action; (3) identifying alternative actions; (4) assessing the preferred actions' environmental consequences; and (5) summarizing opportunities for public participation in the decision process. Project-specific NEPA and CEQA documents may be needed for some of the proposed restoration projects. Other projects may fall within an existing EIS or EIR.

CEQA encourages the use of an EIS or finding of no significant impact or combined state/federal documents in place of a separate EIR or negative declaration. Pub. Res. Code §§ 21083.5, 21083.7, 14 Cal. Code Regs. §§ 15221-15222. The State lead agency intends to use an EIS or finding of no significant impact in place of a separate EIR or negative declaration.

### **California Endangered Species Act, Fish and Game Code Sections 2050 et seq.**

It is the policy of the State of California that state agencies should not approve projects as proposed which would jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat essential to the continued existence of those species if there are reasonable and prudent alternatives available. If reasonable alternatives are infeasible, individual projects may be approved if appropriate mitigation and enhancement measures are provided. Under this act, the Fish and Game Commission established a list of threatened and endangered species based on criteria recommended by the Department of Fish and Game.

### **California Harbor and Navigation Code section 294**

Harbors and Navigation Code section 294 creates absolute liability for damages from the discharge or leaking of gas, oil, or drilling waste onto marine waters. Damages include cost of wildlife rehabilitation, and injury to natural resources or wildlife, and “loss of use and enjoyment of public beaches and other public resources or facilities.” Section 294(g)(1)

### **California Lempert –Keene-Seastrand Oil Spill Prevention and Response Act, Government Code Section 9574.1, et seq.**

Lempert-Keene-Seastrand Oil Spill Prevention and Response Act, commencing with Section 8574.1, became effective on September 24, 1990. This legislation has become the key state compensatory mechanism for subsequent spills. It establishes a comprehensive liability scheme for damages resulting from marine oil spills. Recoverable damages include injury to natural resources, cost of wildlife rehabilitation, and loss of use and enjoyment of natural resources, public beaches, and other public resources.

### **Public Resources Code, Division 6, Sections 6001 et seq.**

The Public Resources Code, Division 6, gives the California State Lands Commission trustee ownership over State sovereign tide and submerged lands. Permits or leases may be required from the State Lands Commission if a restoration project is located on such lands.

## **Other Potentially Applicable Statutes and Regulations**

Additional statutes may be applicable to NRDA restoration planning activities. The statutes listed below, or their implementing regulations, may require permits from federal or state permitting authorities.

Marine Mammal Protection Act, 16 USC 1361, et seq.

Migratory Bird Treaty Act, 16 U.S.C. 703, et seq.

National Park Act of August 19, 1916 (Organic Act), 16 USC 1, et seq.

Archaeological Resources Protection Act, 16 U.S.C. 460, et seq.

National Historic Preservation Act of 1966 as amended (16 U.S.C. 470-470t, 110)

Clean Air Act, 42 U.S.C. 7401, et seq.

Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 6